IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

JOHN MELNIK and
JUDITH MELNIK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FOONBERG & FRANDZEL
A Law Corporation
JAY G. FOONBERG
8530 Wilshire Boulevard
Fourth Floor
Beverly Hills, California 90211
(213) 659-2611

Attorneys for Petitioners

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IN THE
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FOONBERG & FRANDZEL, a Law Corporation, on behalf of JOHN and JUDITH MELNIK, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (Appendix A, infra) is unofficially reported at 73-2 U.S.T.C. Paragraph 9521. The opinion of the Court of Appeals (Appendix B, infra) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, infra) was entered on August 25, 1975. The time for filing a Petition for a Writ of Certiorari expires on December 14, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Judgment vacated and reentered Sept. 16, 1975

QUESTIONS PRESENTED

Whether the Commissioner of the Internal Revenue exceeded the authority granted to him by the Congress in promulgating Treasury Regulation Section 1.162-5(b)(3) on May 8, 1967. Also, whether Regulation Section 1.162-5(b)(3) denies equal protection of the law either on its face or as applied to the Petitioners herein under the Fifth Amendment to the United States Constitution.

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STATUTES AND REGULATIONS INVOLVED.

The pertinent provisions of Section 162 of the Internal Revenue Code of 1954, as amended, 26 U.S.C. 162 and Treasury Regulations Section 1.162-5(b)(3) are set forth in Appendix D, infra.

STATEMENT

During 1969, Petitioner JOHN E. MELNIK,[1/] was employed by the Internal Revenue Service as a revenue agent. During the same year, the Petitioner attended evening programs at Southwestern University School of Law. Petitioner incurred expenditures in the amount of $630.00 as tuition, and $127.79 for supplies and books related thereto. Petitioner's interest was to maintain and improve the skills required of him in his position as a revenue agent with the Internal Revenue Service.

1/ JUDITH MELNIK is a party to this Petition only as a consequence of having filed a joint Federal Income Tax return with her husband JOHN E. MELNIK for the year in question.

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While attending Southwestern University School of Law during 1969, Petitioner took the following courses: Criminal Law; Contracts; Torts; Procedure; Legal Analysis; Property; Equity; Community Property; and Criminal Procedure.

Petitioner had been informed by the law school that these courses were required before he would be allowed to take any tax or related business courses in law school. However, Petitioner contends that the courses he took during 1969 maintained and improved his skills as a revenue agent.

On audit, these claimed law school expenses for both tuition and related books and supplies were disallowed as not being proper trade or business deductions under Section 162 of the Internal Revenue Code of 1954 and the pertinent Treasury Regulations issues thereunder, specifically Treasury Regulation Section 1.162-5(b)(3).

Claims for refund were timely filed with the Internal Revenue Service on or about August 10, 1971. Petitioners' complaint was timely filed in the United States District Court on August 11, 1972 and Respondent's answer thereto on October 17, 1972. On May 18, 1973, Respondent herein filed Notice of Motion for Partial Summary Judgment on the sole issue of the validity of Treasury Regulation Section 1.162-5(b)(3). Petitioners herein filed Opposition to Motion for Partial Summary Judgment on

June 13, 1973. The District Court granted Respondent's Motion for Partial Summary Judgment by Order filed June 18, 1973, thereby upholding the validity of the Regulation and denying Petitioner's claimed educational expenses for law school.

On February 26, 1974, the parties signed and filed Stipulation for Dismissal with Prejudice. A Superceding Stipulation of Dismissal was filed by the parties to the action and signed by District Court JUDGE REAL on April 9, 1974.

On April 19, 1974, Petitioners timely filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the entry of Final Summary Judgment for the United States, which Judgment was entered on April 9, 1974. On August 25, 1975, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court, based upon and upholding the validity of Treasury Regulations Section 1.162-5(b)(3).

REASONS FOR GRANTING THE WRIT

1. The administrative importance of having the issue presented herein be resolved by this Court cannot be adequately stressed, and it can only be understated. Every year, hundreds, if not thousands, of taxpayers claim deductions on their tax returns for law school expenses.

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The Internal Revenue Service is deluged with audits pertaining to this issue. The Justice Department and the Office of the Chief Counsel of the Internal Revenue Service are also deluged with cases ready to go to trial and actually going to trial on this issue. This issue is contested in litigation before the United States Tax Court, the United States District Court and the United States Court of Claims in scores of cases every year. This issue has also been considered by at least four Circuit Courts of Appeals. Weiszmann v. Commissioner, 443 F.2d 29 (9th Cir. 1971); Weiszmann v. Commissioner, 483 F.2d 817 (10th Cir. 1973); Connelly v. Commissioner, 29 A.F.T.R. 2d 72-313 (1st Cir. 1971); and Ruddy v. Commissioner, 31 A.F.T.R.2d 73-965 (4th Cir. 1973).

Commerce Clearing House, Inc., a leading editor and publisher of tax-related matters stated in the November 12, 1975 issue of "Standard Federal Taxes" the following editorial comment: "add to the maze of cases defining a new trade or business for purposes of educational expense deductions this latest Tax Court pronouncement. . . ."

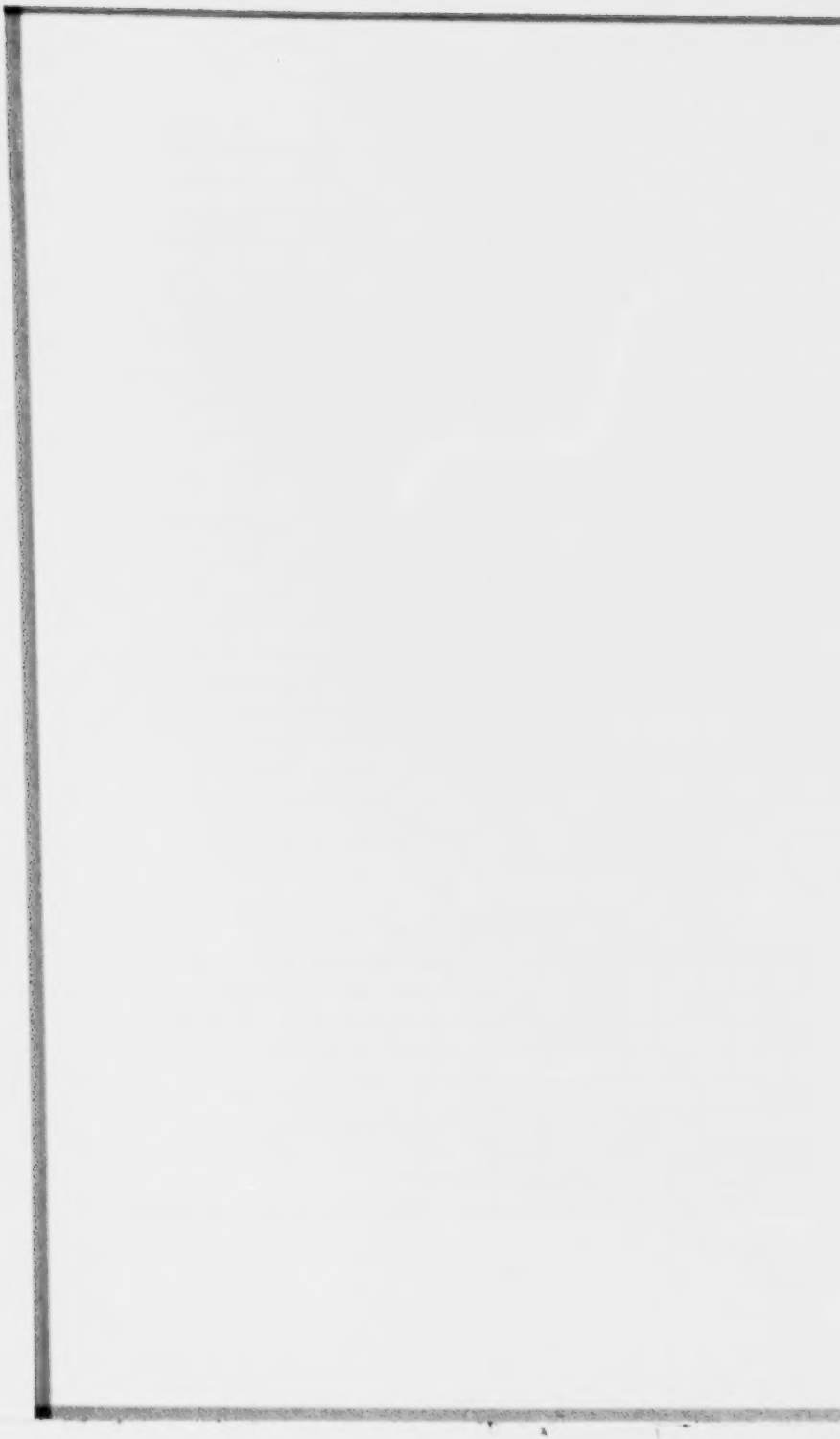
Congress has seen fit to allow a deduction for certain educational expenses. The Congress could, if it wishes, prohibit the deduction. It is not the responsibility or the prerogative of the Commissioner's office to attempt to limit or prevent that which Congress allows.

It is doubtful that the amount of tax involved to the Government taxing system will

be significant in the aggregate if the Commissioner were to win or to lose this case. Indeed, the case before this Court involves less tax than the cost of printing briefs. However, the deduction herein involved, is often a very significant amount to the individual who claims the deduction. While there is no evidence in this case to support the proposition, it would seem that many of the claimants of this deduction are salaried people to whom the subsidy of the tax deduction is significant.

The Commissioner has a large organization capable of arbitrarily disallowing deductions of this nature. The individual taxpayers rarely have the "muscle" to combat the Commissioner. A decision by this Court would be the first decision by this Court on the subject of deducting educational expenses as a business expense. This Court should set the guidelines now to give certainty to an area where certainty is lacking and indecision and litigation abound. Orderly administration of the tax laws mandate that this Court resolve this issue.

2. The decision of the Court of Appeals that Respondent's Treasury Regulation Section 1.162-5(b)(3) is valid and that Petitioner's law school expenses are not deductible in that the attendance of law school qualified him for a new trade or business conflicts with this Court's decisions in Manhattan General Equipment Company v. Commissioner, 297 U.S. 129 (1936) and Kampbell v. Galeno Chemical Co., 281 U.S. 599 (1930). In those cases, this Court determined



that the power of the Commissioner to prescribe regulations for the administration of the Federal Tax Law is not the power to make the law, but it is only the power to carry into effect the will of Congress as expressed by the statute. The Court below failed to apply the principles stated in Manhattan General Equipment and Galeno Chemical Co.

It is imperative that this Court reaffirm its position that the revenue laws are enacted by Congress and administered by the Executive rather than allowing the Executive to enact laws under the guise of "administrative regulations" of the Commissioner of the Internal Revenue. The continuing application of a regulation which is legislative in nature, rather than interpretive, and a final and definitive interpretation of that regulation requires resolution by this Court.

3. The decision of the Court of Appeals conflicts with the following decisions: Welsh v. United States, 329 F.2d 351 (6th Cir. 1964); Williams v. United States, 238 F.Supp. 351 (S.D.N.Y. 1965); Brennen v. Commissioner, 22 CCH Tax Ct. Mem. 1222 (1963); Schultz v. Commissioner, 23 CCH Tax Ct. Mem. 1372 (1964); Kilgannon v. Commissioner, 24 CCH Tax Ct. Mem. 619 (1965); and Fortney v. Campbell, Jr., 64-1 U.S.T.C., Paragraph 9489 (N.D. Tex. 1964). All of these cases held, interpreting Treasury Regulations issued by the Commissioner in 1957, which Treasury Regulations have been replaced by the Treasury Regulations in question herein, that agents of the Internal Revenue Service

and accountants, pursuant to the facts and circumstances of those cases, were entitled to deduct their law school expenses.

In light of these cases and the arbitrariness of the Commissioner in promulgating new Treasury Regulations which changed the law expounded in these cases, this issue requires resolution by this Court.

4. The decision of the Court of Appeals conflicts with the Fifth Amendment to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment, which Equal Protection Clause is applicable to the United States Government pursuant to this Court's decision in Bolling v. Sharpe, 347 U.S. 497 (1954) in that the lower Court refused to recognize that the Treasury Regulation in question on its face discriminates (1) in favor of the teaching profession and (2) against those who attend law school. In fact, Judge Tannenwald of the United States Tax Court in a dissenting opinion stated, "Moreover it is arguable that Respondent's regulations exhibit a favoritism toward the teaching profession which borders on discrimination." John C. Ford, 56 T.C. 1300, 1312 (1971).

The fact that the Treasury Regulation in question on its face violates the Fifth and Fourteenth Amendments to the United States Constitution in that it discriminates in favor of one class of individuals and against another class of individuals requires resolution by this Court of this issue.



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5. The decision of the Court of Appeals conflicts with Moritz v. Commissioner, 469 F.2d 466 (10th Cir. 1972), cert. denied, 412 U.S. 906 (1973) where the Tenth Circuit held that Section 214 of the Internal Revenue Code of 1954 was invalid in the way that it discriminated against a man who has not been married. In so holding, the Tenth Circuit concluded that while deductions are a matter of legislative grace, a denial of them to a particular class may not be based on an invidious discrimination. The Court then went on to hold that classification was an invidious discrimination and accordingly was invalid under due process principles.

Likewise, this case involves a classification which is an invidious discrimination and is accordingly invalid under due process principles. Application of the law (in this case, in the form of a Treasury Regulation) must equally protect those against whom the law applies. Yick Wo v. Hopkins, 118 U.S. 373 (1886). Since the decision below flies in the face of the Moritz and Yick Wo decisions, it should be reviewed and the issue resolved by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FOONBERG & FRANDZEL,
A Law Corporation

By Jay G. Foonberg

Attorneys for Petitioners

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

72-1856-R Civil

June 18, 1973

JOHN MELNIK and JUDITH MELNIK,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

APPEARANCES

Robert L. Fishman, Esq.
Attorney for Plaintiffs
Foonberg & Frandzel
8530 Wilshire Boulevard
Fourth Floor
Beverly Hills, CA 90211

William D. Keller, Esq.
United States Attorney for
The Central District of New York
Attorney for Defendant
Charles H. Magnuson, Esq.
Kenneth L. Gross, Esq.
Eugene D. Silverman, Esq.
Assistant United States Attorneys
United States Courthouse
Los Angeles, CA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

REAL, District Judge: The above-entitled cause came on regularly for hearing before this Court on June 11, 1973, on the Defendant's Motion for partial summary judgment; Foonberg & Frandzel, by Richard L. Fishman personally appearing as counsel for plaintiffs; William D. Keller, United States Attorney for the Central District of California, Charles H. Magnuson, Assistant United States Attorney, Chief, Tax Division, Kenneth L. Gross, Assistant United States Attorney, and Eugene D. Silverman, Assistant United States Attorney, with Eugene D. Silverman personally appearing for Defendant. The Court, having heard the arguments of counsel and having examined and considered the pleadings, motion, memorandum of points and authorities, the pretrial order and other documents on file herein, and the cause having been submitted for decision, and the Court being fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT:

1. Plaintiffs John Melnik and Judith Melnik, husband and wife, are residents of Los Angeles County, California which is within the Central District of California.

2. Plaintiffs are citizens of the United States.

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3. This is a suit for refund of federal income taxes and, as originally instituted, involved the calendar years 1965, 1966 and 1969.

4. All prerequisites, jurisdictional or otherwise, necessary for the plaintiffs to maintain this income tax refund action have been met.

5. During the calendar year 1969, plaintiff John Melnik was employed as a revenue agent of the Internal Revenue Service.

6. During 1969 plaintiff John Melnik was enrolled in the evening law school program at Southwestern University Law School, which was a degree program culminating in the plaintiff receiving his law degree in August 1972.

7. The amounts expended by plaintiff John Melnik with regard to his law school tuition in 1969 was in the amount of $635.00.

8. Additional expenses for supplies and books related to the law school expenses were in the amount of $127.79.

9. Prior to commencing work as a revenue agent and prior to his enrolling in the night law school program, plaintiff John Melnik had completed a full four-year college program and was awarded a bachelor of science degree from the University of Southern California in 1963.

10. During 1969 the courses taken by plaintiff John Melnik while enrolled in his law school program included the following: Criminal Law, contracts, torts, procedure, legal analysis, property, equity, community property, and criminal procedure.

11. On examination, these amounts claimed as educational expense deductions were disallowed by the Internal Revenue Service acting under the authority of Section 162 of the Internal Revenue Code of 1954 and the regulations thereunder, specifically Regulation 1.162-5(b)(3).

12. Neither a law degree nor general legal skills were required of plaintiff to maintain his job as an Internal Revenue field audit agent or for promotion within that position.

13. The threshold question before the Court is the validity of Regulation 1.162-5(b)(3) as it provides that education expenses leading to a degree program such as undertaken here are non-deductible personal expenses.

14. Any conclusion of law deemed as or properly constituting a finding of fact is hereby adopted as a finding of fact.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter involved in this proceeding.

2. Section 162 of the Internal Revenue Code of 1954 authorizes a deduction for "the ordinary and necessary expenses" of carrying on a trade or business.

3. Deductions not permissible under Section 162 of the Internal Revenue Code of 1954 are those which are personal in nature -- Section 262 of the Internal Revenue Code of 1954, and outlays that are capital expenditures rather than current, reoccurring expenses -- Section 263 of the Internal Revenue Code of 1954.

4. The Treasury Regulations under Section 162 specifically provide for the deduction of educational expenses when incurred as an ordinary and necessary cost in a taxpayer's trade or business.

5. Section 1.162-5 of the Regulations was originally promulgated in 1958, was republished in 1959, and was amended in 1967. This amendment of the regulation was specifically made to provide a more objective standard than those prevailing under the originally enacted regulations. Rombach v. United States, 440 F. 2d 1356 (Ct. Cl., 1971); Furner v. Commissioner of Internal Revenue, 393 F.2d 292 (C.A. 7, 1968).

6. Under the revised regulations applicable to the calendar year herein, "expenditures made by an individual for education which is part of a program of study being pursued by him which will lead to qualifying him in a new trade or business" are specifically nondeductible.

Regulation Section 1.162-5(b)(3); Carroll v. Commissioner of Internal Revenue, 418 F.2d 91 (C.A. 7, 1969).

7. Regulation Section 1.162-5(b)(3) dealing specifically with educational expenses which lead to qualifying an individual in a new trade or business is a proper implementing regulation under Section 162 which must be sustained since it is totally consistent with the statute. Commissioner v. South Texas Lumber Company, 333 U.S. 496 (1948). Furthermore, the regulation is deemed to have received implied legislative approval by virtue of reenactment or nonamendment of the statutory provisions to which they are addressed. United States v. Correll, 389 U.S. 299 (1967).

8. Regulation 1.162-5(b)(3) is valid and requires in the instant circumstances that the claimed law school expenses by taxpayer are nondeductible personal expenses regardless of the intent or motive and regardless of whether or not they improved or maintained the skills in his employment so long as they qualify him for a new trade or business. Weiszmann v. Commissioner of Internal Revenue, 443 F.2d 29 (C.A. 9, 1971), affirming per curiam and approving the Tax Court Decision in 52 T.C. 1106 (1969); David N. Bodley, 56 T.C. 1357 (1971); Jeffrey L. Weiler, 54 T.C. 398 (1970); Stanley Marlin, 54 T.C. 560 (1970).

9. Any finding of fact deemed as or properly constituting a conclusion of law is hereby adopted as a conclusion of law.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(Decided August 25, 1975)
Docket No. 74-1927

JOHN MELNIK and JUDITH MELNIK,

PLAINTIFFS - APPELLANTS

V.

UNITED STATES OF AMERICA,

DEFENDANT - APPELLEE

Appeal from the United States District Court for the Central District of California.

BEFORE:

TRASK and CHOY, Circuit Judges
and von der HEYDT, District Judge

PER CURIAM:

OPINION

The Appeal in this tax case is from the action of the district court in granting summary judgment to the United States on a claim by the taxpayers for the deductibility of educational expenses.



[1] The district court applied Treasury Regulation §1.162-5(b)(3) to Melnik, an Internal Revenue Agent doing field audits and determined that his expenditures in acquiring a law degree were made to qualify him for a new trade of business and were, therefore, nondeductible. The taxpayers paid and sued for a refund. Melnik challenges the interpretation of the regulation by the Court and also its constitutionality on fifth amendment due process grounds. The court below denied relief on both grounds. 73-2 U.S. Tax Cas. Paragraph 9521 (C.D. Cal. 1973).

A similar claim was made by a taxpayer and rejected by the tax court in Weiszmann v. Commissioner, 52 T.C. 1106 (1969), and we affirmed the decision. Weiszmann v. Commissioner, 443 F.2d 29 (9th Cir. 1971). That case is dispositive of the present appeal and we therefore affirm the decision of the district court.

Judgment Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MELNIK and JUDITY MELNIK,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 74-1927

D.C. No. 72-1856

Appeal from the United States District Court for the Central District of California.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of said District Court in this cause be, and hereby is affirmed.



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With costs in this court in favor of the Appellee and against the Appellant in the amount of $105.50.

Cost of printing Appelee's brief $105.50.

Filed and entered August 25, 1975

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 162 TRADE OR BUSINESS EXPENSES

(a) IN GENERAL. There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including --

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within



the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.00.

Treasury Regulations (1954 Code)

Reg. §1.162-5 EXPENSES FOR EDUCATION

(a) GENERAL RULE. Expenditures made by an individual for education (including research undertaken as part of his educational program) which are not expenditures of a type described in paragraph (b)(2) or (3) of this section are deductible as ordinary and necessary business expenses (even though the education may lead to a degree) if the education --

(1) Maintains or improves skills required by the individual in his employment or other trade or business, or

(2) Meets the express requirements of the individual's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the individual of an established employment relationship, status, or rate of compensation.

(b) NONDEDUCTIBLE EDUCATIONAL EXPENDITURES. (1) IN GENERAL

Educational expenditures described in subparagraphs (2) and (3) of this paragraph are personal expenditures or constitute an inseparable aggregate of personal and capital expenditures and, therefore, are not deductible as ordinary and necessary business expenses even though the education may maintain or improve skills required by the individual in his employment or other trade or business or may meet the express requirements of the individual's employer or of applicable law or regulations.

* * *

(3) QUALIFICATION FOR NEW TRADE OR BUSINESS. (i) The second category of nondeductible educational expenses within the scope of subparagraph (1) of this paragraph are expenditures made by an individual for education which is part of a program of study being pursued by him which will lead to qualifying him in a new trade or business. In the case of an employee, a change of duties does not constitute a new trade or business if the new duties involve the same general type of work as is involved in the individual's present employment. For this purpose, all teaching and related duties shall be considered to involve the same general type of work. The following are examples of changes in duties which do not constitute new trades or businesses:

(a) Elementary to secondary school classroom teacher.



(b) Classroom teacher in one subject (such as mathematics) to classroom teacher in another subject (such as science).

(c) Classroom teacher to guidance counselor.

(d) Classroom teacher to principal.

(ii) The application of this subparagraph to individuals other than teachers may be illustrated by the following examples:

EXAMPLE (1). A, a self-employed individual practicing a profession other than law, for example, engineering, accounting, etc., attends law school at night and after completing his law school studies receives a bachelor of laws degree. The expenditures made by A in attending law school are nondeductible because this course of study qualifies him for a new trade or business.

EXAMPLE (2). Assume the facts as in example (1) except that A has the status of an employee rather than a self-employed individual, and that his employer requires him to obtain a bachelor of laws degree. A intends to continue practicing his nonlegal profession as an employee of such employer. Nevertheless, the expenditures made by A in attending law school are not deductible since this course of study qualifies him for a new trade or business.

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-997

JOHN MELNICK AND JUDITH MELNICK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented in this federal income tax case is whether petitioner[1] was entitled to deduct as trade or business expenses under Section 162 of the Internal Revenue Code of 1954 the costs he incurred in attending law school. Both courts below upheld the Commissioner's disallowance of petitioner's claimed deduction on the ground that they qualified him for a "new trade or business" within the meaning of Treasury Regulations, Section 1.162-5(b)(3) (26 C.F.R.).

Petitioner was employed as a revenue agent with the Internal Revenue Service. During 1969, the year at issue, he began to attend night classes at the Southwestern University Law School. He continued his

[1] "Petitioner" refers to John Melnick. His wife, Judith Melnick, is a party solely because she filed a joint return with her husband for the year in issue.

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studies and obtained a law degree in 1972. The Internal Revenue Service did not require its revenue agents to have a knowledge of legal skills or a law degree. Thus, petitioner could have maintained his position as a revenue agent and been promoted within that position without attending law school (Pet. App. A A-2 to A-3).

Pursuant to Treasury Regulations, Section 1.162-5(b)(3), the Commissioner of Internal Revenue disallowed petitioner's claimed deduction for law school expenses on the ground that they were incurred in order to qualify petitioner for the new trade or business of an attorney (Pet. App. A A-3). In this refund suit, the district court upheld the Commissioner's determination (Pet. 4-5; Pet. App. A A-1 to A-5; Pet. App. B B-1 to B-2), and ruled that Treasury Regulations, Section 1.162-5(b)(3) was a valid implementation of the statute (Pet. App. A A-5). The Ninth Circuit affirmed *per curiam* (Pet. 5; Pet. App. B B-1 to B-2).

1. Section 162(a) of the Code permits a deduction for the "ordinary and necessary expenses paid or incurred * * * in carrying on any trade or business." On the other hand, Sections 262 and 263 of the Code respectively deny deductions for personal expenses and for capital expenditures.

Section 1.162-5 of the Regulations, which governs the deductibility of education expenses, harmoizes these three statutes. It provides that the costs of education directed toward maintaining or improving job skills or toward meeting educational requirements imposed by an employer may be deducted. However, it bars the deduction of educational expenses that "qualify * * * [a taxpayer] in a new trade or business." Section 1.162-5(b)(3). Thus, the Regulation gives full effect to the policies inherent in Sections 162, 262 and 263 of the Code

by distinguishing those educational expenses that are "ordinary and necessary" expenses of a trade or business from those that are more closely related to a taxpayer's personal life or those that provide benefits over the indeterminate life of the new career the education made possible so as to constitute capital expenditures. *Weiszmann* v. *Commissioner*, 52 T.C. 1106, 1111, affirmed *per curiam*, 443 F.2d 29 (C.A. 9); *Bodley* v. *Commissioner*, 56 T.C. 1357, 1361; *Jungreis* v. *Commissioner*, 55 T.C. 581, 590-591.

Contrary to petitioner's argument (Pet. 6, 8-9), the 1967 amendments to the Regulations[2] were not a legislative usurpation by the Executive Branch. As this Court has observed, "Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code." *United States* v. *Correll*, 389 U.S. 299, 307; *Bingler* v. *Johnson*, 394 U.S. 741, 750-751. Here, the revised Regulation fully carried out the congressional policy of allowing ordinary and necessary expenses of a trade or business but disallowing the deduction of personal expenses or capital expenditures. *Weiszmann* v. *Commissioner*, *supra*, 52 T.C. at 1111; *Jungreis* v. *Commissioner*, *supra*, 55 T.C. at 590-591. Indeed, Section 1.162-5(b)(3) of the Regulations has been upheld as a proper implementation of the statute. *Weiszmann* v. *Commissioner*, *supra*; *O'Donnel* v. *Commissioner*, 62 T.C. 781, 783; *Weiler* v. *Commissioner*, 54 T.C. 398, 401-402.

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[2]Section 1.162-5 of the Regulations was originally promulgated in 1958. T.D. 6291, 1958-1 Cum. Bull. 63, 67. In 1967, the Regulation was amended by T.D. 6918, 1967-1 Cum. Bull. 36, 37-39.

Petitioner's major contention (Pet. 6, 8-9) is that the amended Regulation improperly denies a deduction for certain education expenses which might have qualified for deduction under the earlier Regulations. Under the old Regulation deductibility depended upon the taxpayer's "primary purpose" in furthering his education. If that "primary purpose" was to maintain or improve skills required in his employment, rather than to obtain a new position, to achieve a substantial advancement in position or to fulfill the taxpayer's general educational aspirations, the costs of education qualified for deduction. The 1967 amendment eliminated the "primary purpose" test and substituted an objective standard for determining whether the educational expense is deductible. *Carroll* v. *Commissioner*, 418 F.2d 91 (C.A. 7); *Weiler* v. *Commissioner, supra*, 54 T.C. at 401; *Bodley* v. *Commissioner, supra*, 56 T.C. at 1360.[3]

However, as this Court has repeatedly held, taxpayers have no vested rights in outstanding Regulations.[4] Instead, the Secretary of the Treasury may amend those pre-existing Regulations, as long as the amendments are consistent with the underlying legislation. See *American Chicle Co.* v. *United States*, 316 U.S. 450, 454-455; *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90,

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[3]The cases upon which petitioner relies (Pet. 8-9) were decided under the "primary purpose" test of the earlier Regulations. See, *e.g.*, *Welsh* v. *United States*, 329 F.2d 145 (C.A. 6); *Williams* v. *United States*, 238 F. Supp. 351 (S.D.N.Y.); *Fortney* v. *Campbell*, 64-1 U.S.T.C. Par. 9489 (N.D. Texas); *Kilgannon* v. *Commissioner*, 24 T.C.M. 619; *Schultz* v. *Commissioner*, 23 T.C.M. 1372; and *Brennan* v. *Commissioner*, 22 T.C.M. 1222. Accordingly, they do not conflict with the decision below.

[4]Indeed, since petitioner did not begin his law studies until 1969, two years after the Regulation was amended, he cannot claim that he relied on the old Regulation to his detriment.

97, 100-101; *Morrissey* v. *Commissioner,* 296 U.S. 344, 354-355. "Experience, changing needs, changing philosophies inevitably produce constant change." *Helvering* v. *Wilshire Oil Co., supra,* 308 U.S. at 97. Indeed, it was the difficulty of applying the "primary purpose" test of the old Regulations that led to the promulgation of the amended Regulations here in issue. *Rombach* v. *United States,* 440 F.2d 1356, 1358 (Ct. Cl.).

Petitioner further contends (Pet. 9-10) that the Regulations favor those in the teaching profession, while discriminating against those who attend law school. Under the Regulations, the costs of education required of school teachers in order to maintain their teaching positions may be deductible even though the education obtained might qualify the teachers for employment as school principals or school guidance counselors. However, employment as a school principal or guidance counselor can be said to represent another aspect of a teacher's employment in the field of education rather than an entirely "new trade or business" (*Weiszmann* v. *Commissioner, supra,* 443 F.2d at 30).

Here, however, there was little, if any, connection between the law degree and general legal skills petitioner sought and his job as a field audit agent for the Internal Revenue Service (Pet. App. A-3). In the absence of any nexus between petitioner's business and the law school expenses here involved, they cannot be deducted as an ordinary and necessary business expense under Section 162.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

DOJ-1976-03

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-839

JOHN MELNIK and
JUDITH MELNIK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

FOONBERG & FRANDZEL
A Law Corporation
JAY G. FOONBERG
8530 Wilshire Boulevard
Fourth Floor
Beverly Hills, California 90211
(213) 659-2611

Attorneys for Petitioners



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Pursuant to Rule 24(4) of this Court's Rules, FOONBERG & FRANDZEL, a Law Corporation, on behalf of JOHN and JUDITH MELNIK, files this Reply Brief to Memorandum for the United States in Opposition.

1. Petitioners' primary reason for granting the Writ of Certiorari is as follows, "The administrative importance of having the issue

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presented herein be resolved by this Court cannot be adequately stressed and it can only be understated. Every year, hundreds, if not thousands, of taxpayers claim deductions on their tax returns for law school expenses. The Internal Revenue Service is deluged with audits pertaining to this issue. . . . A decision by this Court would be the first decision by this Court on the subject of deducting educational expenses as a business expense. This Court should set the guidelines now to give certainty to an area where certainty is lacking and indecision and litigation abound. Orderly administration of the tax laws mandate that this Court resolve this issue." (Pet. 5-6, 7.) Nowhere in its Memorandum has the Respondent contradicted or challenged Petitioners' contention that the issue involved herein should be resolved by this Court due to the administrative importance of said issue.

2. Respondent has misconstrued Petitioners' major contention. (Resp. 4.) Petitioners do not contend that they are entitled to a deduction for certain educational expenses based on the earlier Regulations. Rather, Petitioners rely on Section 162(a) of the Code (which permits a deduction for the "ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business") and the following Court decisions which interpret Section 162: Welsh v. United States, 329 F.2d 351 (6th Cir. 1964); Williams v. United States, 238 F.Supp. 351 (S.D.N.Y. 1965); Brennen v. Commissioner, 22 CCH Tax Ct. Mem. 1222 (1963); Schultz v. Commissioner, 23 CCH Tax Ct. Mem. 1372 (1964); Kilgannon v. Commissioner, 24 CCH Tax Ct.

Mem. 619 (1965); and Fortney v. Campbell, Jr., 64-1 U.S.T.C., Paragraph 9489 (N.D. Tex. 1964). All of these cases held, interpreting Section 162 of the Code, that agents of the Internal Revenue Service and accountants, pursuant to the facts and circumstances of those cases, were entitled to deduct their law school expenses. Admittedly, these decisions interpreted the earlier Regulations, however, in interpreting those Regulations, those Courts were allowing a deduction under Section 162 of the Code; not a deduction under the Regulations.

Respondent has stated that taxpayers have no vested rights in outstanding Regulations (Resp. 4). In addition, Respondent stated, "Indeed, since Petitioner did not begin his law studies until 1969, two years after the Regulation was amended, he cannot claim that he relied on the old Regulation to his detriment." (Resp. 4-fn. 4.) Petitioner is not claiming that he relied on the earlier Regulations to his detriment. Rather, Petitioner claims that he is relying on the above-stated cases, which cases stated that pursuant to Section 162 of the Code, he would be entitled to a deduction for his law school expenses.

3. Respondent states that the new Regulations substituted an objective standard for the old "primary purpose" test of the earlier Regulation due to the difficulty of applying the "primary purpose" test. While there is no evidence in this case to support the proposition, Petitioners submit that the number of taxpayers who claim deductions for educational expenses under Section 162 of the Code, plus the amount

of litigation pertaining to the objective standards of the new Regulations, has increased, rather than decreased. One need only look at the number of court decisions pertaining to the deduction of law school expenses and educational travel expenses to reach this determination.

4. In Respondent's Memorandum, it is stated, "Here, however, there was little, if any, connection between the law degree and general legal skills Petitioner sought in his job as a field audit agent for the Internal Revenue Service. . . . In the absence of any nexus between Petitioner's business and the law school expenses here involved, they cannot be deducted as an ordinary and necessary business expenses under Section 162." (Resp. 5.) Since the Courts below determined that the Regulation herein was valid, and that Petitioner's law school education qualified him for a new trade or business, neither Court below made a determination as to whether the Petitioner's law school education maintained or improved his skills as an Internal Revenue Service revenue agent. Accordingly, there is no support for the Respondent's just-stated contention in its Memorandum.

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FOONBERG & FRANDZEL
A Law Corporation

By Jay G. Foonberg

Attorneys for Petitioners